Calendar No. 1956

82D CONGRESS
2d Session

SENATE

REPORT
No. 2039

COMMERCE TRUST CO.

JULY 1 (legislative day, JUNE 27), 1952.—Ordered to be printed

Mr. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 3060]

The Committee on the Judiciary, to which was referred the bill (H. R. 3060) for the relief of the Commerce Trust Co., having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

AMENDMENT

At page 2, line 7, strike the period, insert a colon in lieu thereof, and add the following:

Provided, however, That nothing contained in this Act shall be construed as an inference of liability on the part of the United States Government or any other defendant named in such suit.

The purpose of the amendment is apparent on its face.

PURPOSE

The purpose of the proposed legislation, as amended, is to confer jurisdiction upon the United States District Court for the Eastern District of Oklahoma to hear, determine, and render judgment upon the claims of the Commerce Trust Co. of Kansas City, Mo., against the United States arising out of the exaction of certain deficit royalties by the United States with respect to coal mining leases on certain lands in LeFlore County, Okla.

STATEMENT

The circumstances forming the background of the proposed legislation extend back to 1899, when the Department of the Interior, as mining trustee for the Choctaw and Chickasaw Indian Nations, approved a lease to the Ozark Coal & Railway Co. of 960 acres of land situated in LeFlore County, Okla. This land covered tribal coal deposits, and the lease was executed pursuant to the act of June 28, 1898 (30 Stat. 495), and regulations of the Secretary of the Interior approved October 7, 1898. On November 5, 1900, the mining trustee and the lessee entered into an additional agreement applying to the lease which provided in part as follows:

> And said party of the second part expressly agrees to pay to said United States Indian Agent any additional rate of royalty that may be prescribed by the Secretary of the Interior during the term this lease shall be in effect, and will operate and produce coal from each and every lease, not less than the following quantities: Three thousand tons during the first year from date of approval of lease; four thousand tons the second year; seven thousand tons the third year; eight thousand tons the fourth year; and fifteen thousand tons the fifth and each succeeding year thereafter.

Subsequently the original lessee sold the lease under foreclosure proceedings, to satisfy a mortgage indebtedness thereon, to one William C. Renfrow, who organized the Panama Coal Co. as an Oklahoma corporation and assigned the lease to it, with approval of the mining trustee, on October 11, 1911. The Commerce Trust Co. purchased the leasehold estate of the Panama Coal Co. at a mortgage foreclosure sale in 1925, the sheriff's deed in favor of this purchaser being executed on April 16, 1926.

The Commerce Trust Co.'s claims grow out of payments made by the Panama Coal Co. because of its failure to mine the minimum tonnage of coal required by regulations of the Secretary of the Interior issued in 1907.

Under the provisions of the lease, the lessee was to pay to the Indian tribes 8 cents per ton for coal mined and was required to pay $500 advance royalty yearly, representing the royalty on 6,250 tons. If this advance payment was not absorbed by actual production, the balance was to stand as a credit to the lease and could be applied by the lessee to royalty on future production over and above the required 6,250 tons yearly. On December 6, 1907, the Secretary of the Interior promulgated regulations which required that the lessees of the segregated coal lands, including the lessee under this particular lease, should mine a minimum amount of 15,000 tons per year; and if they failed to mine that much, they should pay the royalty as though it had been mined. The regulations further provided that should the lessee fail to make this payment, the lease should be forfeited. This extra royalty, required whether or not coal was mined, became known as deficit royalty or minimum-tonnage royalty to distinguish it from the advance royalty required by the lease.

Throughout the period from 1907 until 1926 the lessees paid the minimum tonnage royalty exacted by the 1907 regulations, in addition to the advance royalty required by the lease. Some other lessees of segregated coal lands in a like position to that of the Panama Coal Co. questioned the propriety of the regulations requiring minimum tonnage royalties and refused to pay the same. The United States brought two cases in the United States District Court for the Eastern

District of Oklahoma to enforce payment, and in both it was held that incorporation of the minimum tonnage royalty provision in the 1907 regulations was beyond the power of the Secretary of the Interior under the terms of the act of June 28, 1898, supra (*United States* v. *McMurray, et al.*, 181 Fed. 723 (1910), *United States* v. *Degnan and McConnell Coal & Coke Co.* (decided 1915, not officially reported)). In spite of these two cases the mining trustee continued to demand and exact the minimum tonnage royalty from the Panama Coal Co., which was paid from advances supplied by the Commerce Trust Co. as mortgagor after 1920 and up to the time of foreclosure by the latter company in 1925.

On April 18, 1931, the Commerce Trust Co. subleased the premises to the Daisy Diamond Coal & Mining Co., and this sublease with all rights thereunder was mortgaged to the Commerce Trust Co. to secure an indebtedness of $45,000. By act of Congress dated April 21, 1932, the lessees of segregated coal leases were given a preferential right to obtain an extension of 15 years from and after September 25, 1932, so that a value still remained in the leasehold premises.

The mortgage of the Daisy Diamond Coal & Mining Co. being in default, the Commerce Trust Co. brought suit to foreclose this mortgage in case No. 4426 in the United States District Court for the Eastern District of Oklahoma. This proceeding resulted in foreclosure and the appointment of a receiver for the Daisy Diamond Coal & Mining Co. in said cause. This receiver made an application on behalf of Daisy Diamond Coal & Mining Co. for an extension of the lease under the provision of the act of April 21, 1932. While this application was pending, the leasehold rights were transferred pursuant to foreclosure to a nominee of the Commerce Trust Co., and, pursuant to contract, to the Panama Coal & Mining Co., a new corporation, which was then substituted for the Daisy Diamond Coal & Mining Co. as applicant for the extension of the lease. This application pended up until 1934 when a new lease to the Panama Coal & Mining Co. was approved and that company set about renovating mining operations and started to mine coal.

In 1935 a disastrous flood occurred which destroyed the mine on the lease and rendered future operations impractical. Thereafter, the new lease was canceled.

The Government instituted new suits in 1931 to test the correctness of the earlier decisions against the validity of the regulations requiring minimum tonnage royalties. When the United States District Court for the Eastern District of Oklahoma again ruled that such royalties could not be exacted the Government ceased efforts to enforce the regulations requiring payment of the minimum tonnage royalties. Two of these cases were appealed to, and upheld by, the United States Court of Appeals for the Tenth Circuit (*United States* v. *Missouri-Kansas-Texas Ry. Co. et al.*, 66 F. 2d 919 (1933), and *United States* v. *Eastern Coal and Mining Co. et al.*, 66 F. 2d 923 (1933)).

The Secretary of the Interior recommends against enactment of the proposed legislation, in a letter report on a prior, similar bill, which is appended hereto and made a part of this report. This adverse recommendation is rested largely on the premise that the royalty payments in question were made voluntarily, and hence are subject to an established rule of law that such payments cannot be recovered even though there existed no legal obligation requiring payment of the royalties.

This assertion of voluntary payment is controverted by counsel for the claimant, Mr. Julian B. Fite, in two letters concerning the proposed legislation, which are appended also and made a part of this report. In these letters Mr. Fite states that the claim of the Commerce Trust Co. and its assignor have been followed assiduously since it accrued, and asserts necessity for referring this matter to a court for a proper determination.

The committee is of the opinion, in view of the complexity of the facts and issues involved, that claimant should have its day in court, despite the lapse of time, in order to achieve a judicious disposition of its claim. Therefore, with an express declaration that ultimate enactment of this proposed legislation shall not be considered as an inference of liability on the part of the Government, or any other defendant named in the suit to satisfy the claim of the Commerce Trust Co., the committee recommends favorable consideration of H. R. 3060.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., February 27, 1950.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: Further reference is made to your request for a report on H. R. 4459 entitled "A bill for the relief of the Commerce Trust Co."

For the reasons hereafter given, I recommend that H. R. 4459 be not enacted.

The Commerce Trust Co. is asserting a claim of $6,395.21 for minimum-tonnage royalty paid voluntarily by the Panama Coal Co. under a coal-mining lease covering 960 acres which belonged to the Choctaw and Chickasaw Nations. The lease, dated October 11, 1899, was approved in this Department December 8, 1900, for a term of 30 years from the date thereof. It was entered into with the Ozark Coal & Railway Co. as lessee, pursuant to the act of June 28, 1898 (30 Stat. 495), and the regulations approved October 7, 1898. The Choctaw and Chickasaw Nations were the lessors.

On October 19, 1911, this Department approved the sale of the leasehold to W. C. Renfrew and the assignment of the lease by the purchaser to the Panama Coal Co.

The records of this Department show that the Commerce Trust Co. purchased the leasehold estate of the Panama Coal Co. at a mortgage foreclosure sale. The sheriff's deed in favor of the trust company was executed April 16, 1926. The lease expired by its terms on October 11, 1929. It does not appear from our records that the trust company operated the lease.

The trust company's claim grows out of payments made by the Panama Coal Co. because of its failure to mine the minimum tonnage of coal required by the regulations issued on May 22, 1900, and December 6, 1907. These regulations were prescribed pursuant to that part of section 29 of the 1898 act which reads as follows:

"All coal and asphalt mines in the two Nations, whether now developed, or to be hereafter developed, shall be operated * * * under such rules and regulations as shall be prescribed by the Secretary of the Interior."

By the regulation of May 22, 1900, the Secretary of the Interior amended the regulations issued October 7, 1898, and required that lessees "operate and produce coal * * * in not less than the following quantities: three thousand tons during the first year from date of approval of lease; four thousand tons the second year; seven thousand tons the third year; eight thousand tons the fourth year; and fifteen thousand tons the fifth and each succeeding year."

The regulation of December 6, 1907, amended the regulation of May 22, 1900, to give the lessee the option to pay royalty on the required annual tonnage in lieu of stipulated production.

By the terms of the lease the lessee agreed that the lease should be subject to the regulations theretofore or thereafter prescribed under the 1898 act by the Secretary of the Interior. By the terms of the agreement accompanying the assignment the assignee, the Panama Coal Co., agreed to be bound by the regulations theretofore prescribed on May 22, 1900, or that might thereafter be pre-

scribed. The agreement and assignment are dated September 11, 1911, and both instruments were approved by the Assistant Secretary of the Interior on October 19, 1911.

In the cases of *United States* v. *McMurrary et al.* (181 Fed. 723 (Cir. Ct., E. D. Okla., 1910)), and *United States* v. *Degnan and McConnell Coal and Coke Company* (unreported), it was held that the incorporation of the minimum tonnage provisions in the regulations mentioned above was beyond the power of the Secretary of the Interior under the terms of the 1898 act. New suits to test the correctness of these decisions were instituted in 1931 to collect the minimum tonnage royalties. These cases are entitled *United States* v. *Missouri-Kansas-Texas Railway Company et al.* (66 F. 2d 919 (C. C. A. 10th, 1933)), and *United States* v. *Eastern Coal and Mining Company et al.* (66 F. 2d 923 (C. C. A. 10th, 1933)). In denying recovery in these cases, the court again ruled that minimum tonnage regulations were invalid.

The decisions in the Railway and the Eastern Coal Co. cases were made subsequent to the payments for which claim is made. The payments were made pursuant to regulations promulgated 26 years prior to the submission of the instant claim to the Department. The payments were made voluntarily and not under protest and have been disbursed to the Indians. It is a well-settled rule of law that one who pays money with full knowledge of the facts, and in the absence of fraud or duress, cannot recover the amount so paid even though he was not legally obligated to make the payment. I see no reason why this established rule of law should be set aside by the passage of H. R. 4459.

Should any valid claim exist, it is against the Choctaw and Chickasaw Nations and not the United States (*United States* v. *Algoma Lumber Company*, 305 U. S. 415). The property belonged to the nations and the royalty income was deposited to their credit in the United States Treasury. Representatives of the nations have consistently objected to the payment of the claim.

The Bureau of the Budget has advised me that there is no objection to the ubmission of this report to the committee.

Sincerely yours,

OSCAR L. CHAPMAN,
Secretary of the Interior.

MUSKOGEE, OKLA., *March 17, 1949.*

COMMERCE TRUST CO.,
Kansas City, Mo.

GENTLEMEN: In accordance with your directions, I herewith give you for the purpose of attaching to a request for special remedial legislation by Congress a detailed history of the claim of the Commerce Trust Co. of Kansas City, Mo., as assignee of the Panama Coal Co. and Panama Coal & Mining Co. against the United States of America in its capacity as trustee for the Choctaw and Chickasaw Nations of Indians.

The claim is a claim against the Choctaw and Chickasaw Nations. It is for a refund of payments illegally exacted by the United States of America acting on behalf of the Choctaw and Chickasaw Nations. These payments were exacted with reference to a lease for the purpose of mining coal from the east half of section 20 and all of section 21 in township 8 north and range 25 east in the Choctaw Nation, Indian Territory, now in Le Flore County, Okla. These lands are what are known as segregated coal lands. At the time of the allotment of the lands of the Choctaw and Chickasaw Nations to the individual members of those tribes, it was known that there were coal deposits underlying portions of these lands, and for the benefit of the tribes as a whole these coal deposits were withheld from allotment and segregated—hence, the terminology, "segregated coal lands." These coal deposits were leased by the trustees of the Choctaw and Chickasaw Nations to coal companies. We now turn to the history of this particular lease.

HISTORY OF THE LEASE

Pursuant to section 29 of the act of Congress, approved June 28, 1898 (30 Stat. 495), the mining trustees of the segregated coal lands of the Choctaw and Chickasaw Nations, on October 11, 1899, executed a certain coal lease on segregated coal deposits to the Ozark Coal & Railway Co., covering the east half of section 20, and all of section 21 in township 8 north, range 25 east, in Choctaw Nation, Indian Territory. This lease was approved by the Secretary of the Interior on September 8, 1900, pursuant to the rules and regulations of the Secretary, dated October 7, 1898.

This lease was one of those particularly authorized by the provision of the above agreement and statute authorizing: "All contracts made by the National Agents of the Choctaw and Chickasaw Nations for operating coal and asphalt with any person or corporation, which were, on April 23, 1897, being operated in good faith, are hereby ratified and confirmed, and the lessee shall have the right to renew the same when they expire, subject to all provisions of this Act."

Leases under the above quoted provision are known as national contracts.

Under the provisions of this lease, the lessee was to pay to the Indian tribes 8 cents per ton for coal mined and were required to pay $500 advance royalty yearly representing the royalty on 6,250 tons. If this advance payment was not absorbed by actual production, the balance was to stand as a credit to the lease and could be applied by the lessee to royalty on future production over and above the required 6,250 tons yearly. On December 6, 1907, without any authority of law, the Secretary of the Interior, apparently concluding that this was too small a minimum, promulgated regulations which required that the lessees of the segregated coal lands, including the lessee of this particular lease, should mine a minimum amount of 15,000 tons per year; and if they failed to mine that much, they should pay the royalty as though it has been mined. The regulations further provided that should the lessee fail to make this payment, the lease should be forfeited. This extra royalty required whether or not coal was mined became known as deficit royalty or minimum tonnage royalty to distinguish it from the advance royalty required by the lease.

The effect of the provision was to superimpose upon the $500 payment the further payment of $700 in order for the lessee to retain a nonproductive lease.

The Ozark Coal & Railway Co., the lessee, apparently operated this lease with some success at first but became involved in 1909, and on October 8, 1909, mortgaged the leasehold interest to one W. G. Renfrow. This mortgage was duly recorded in the office of the country clerk in Le Flore County, Okla., June 29, 1909, in book 25 at page 277. This mortgage was foreclosed in an action in the District Court of Le Flore County, Okla., in a cause entitled *W. C. Renfrow* v. *Ozark Coal & Railway Co.*, No. 279, in said court, and judgment of foreclosure was rendered in such cause on November 27, 1909. A sheriff's sale was had by virtue of the judgment on January 2, 1910, and a sheriff's deed was issued to W. C. Renfrow which was filed for record on April 6, 1910, in book 36 at page 46 in the office of the county clerk of Le Flore County, Okla. W. C. Renfrow assigned this property to the Panama Coal Co., and the sale and assignment to the Panama Coal Co. was approved by the Secretary of the Interior as shown by endorsement of the original lease filed for record October 14, 1920, in the office of the county clerk of Le Flore County, Okla., in book 110 at page 526.

The Panama Coal Co., then proceeded to operate the lease. Production was always small and there seemed to be great difficulty in the operation of the lease, but up until 1920, more than the minimum production was had.

On November 1, 1920, the Panama Coal Co. mortgaged this property to the Commerce Trust Co. of Kansas City, Mo., to secure an indebtedness of $48,000. This mortgage was filed for record in the office of the county clerk of Le Flore County, Okla., on June 4, 1921, in book 112 at page 503. Little production was had after this time, but the Commerce Trust Co. continued to advance the advance and minimum tonnage royalty to the Panama Coal Co., which paid these items over to the superintendent of the Five Civilized Tribes under the compulsion of the Secretary of the Interior in order to keep the lease alive. Finally, this mortgage was foreclosed and a judgment was obtained on December 2, 1925, in the District Court of Le Flore County, Okla., in case entitled *Commerce Trust Company* v. *Panama Coal Company*. Pursuant to this judgment, sale was had on March 22, 1926, to the Commerce Trust Co., and a sheriff's deed dated April 16, 1926, was issued to Commerce Trust Co. and filed for record in the office of the county clerk of Le Flore County, Okla., in book 31 at page 454, and the Commerce Trust Co. became the owner of the leasehold interest. These proceedings were subsequently presented to the Department of Interior and were duly approved.

The lease expired by its terms in 1929; however, by act of Congress all of leases of segregated coal lands were made to extend to September 1932

On April 18, 1931, the Commerce Trust Co. subleased the premises to the Daisy Diamond Coal & Mining Co., and this sublease with all rights thereunder was mortgaged to the Commerce Trust Co. to secure the payment of $45,000. By act of Congress dated April 21, 1932, the lessees of segregated coal leases were given a preferential right to obtain an extension of 15 years from and after September 25, 1932, so that a value still remained in the leasehold premises.

The mortgage of the Daisy Diamond Coal & Mining Co. being in default, the Commerce Trust Co. brought suit to foreclose this morgtage in case No. 4426 in the United States District Court for the Eastern District of Oklahoma. This proceeding resulted in foreclosure and the appointment of a receiver for the Daisy Diamond Coal & Mining Co. in said cause. This receiver made an application on behalf of Daisy Diamond Coal & Mining Co. for an extension of the lease under the provision of the act of April 21, 1932. While this application was pending, the leasehold rights were transferred pursuant to foreclosure to a nominee of the Commerce Trust Co., and, pursuant to contract, to the Panama Coal & Mining Co., a new corporation, which was then substituted for the Daisy Diamond Coal & Mining Co. as applicant for the extension of the lease. This application pended up until 1934 when a new lease to the Panama Coal & Mining Co. was approved and that compnay set about renovating mining operations and started to mine coal.

In 1935 a disastrous flood occurred which destroyed the mine on the lease and rendered future operations impractical. Thereafter, the new lease was canceled.

THE CLAIM

Throughout the period from 1907 until 1926, in addition to the advance royalty required by the lease, the lessees paid the minimum-tonnage royalty exacted by the illegal regulation of the Secretary of the Interior.

Some of the coal companies which were in a like position to that of the Panama Coal Co. questioned the priority of the regulation calling for the additional $700 per year royalty on coal not mined and refused to pay it. The United States of America brought two cases in the United States District Court for the Eastern District of Oklahoma. The case of the United States for the use of the *Choctaw and Chickasaw Nations* v. *McMurray* (185 Fed. 723), and *U. S.* v. *Degnan McConnell Coal & Mining Company* (145 Law; opinion rendered by Campbell, district judge, but never officially reported). In both of these cases it was held that the charge was illegal. However, in spite of these two cases, the United States continued to demand and exact from the lessee the so-called minimum tonnage royalty.

During the period that it was the lessee, the Panama Coal Co. had a varied but disastrous experience with the mine located upon this lease so that in the main the production fell far below the minimum requirements and many of the years the lease was wholly unproductive. It accrued a combined credit for advance and minimum tonnage royalty totaling $13,777.21, which stood to its credit at the time the lease was finally foreclosed in 1925. By virtue of this foreclosure, the Commerce Trust Co. became the owner of all of the rights of the Panama Coal Co. However, lest there be any question of its being vested with the rights to any refund, a specific assignment was procured of the right to refund credit.

About this time the United States again decided to test the validity of the 1907 regulation of the Secretary of the Interior and brought a number of suits against lessees who had failed or refused to pay the minimum tonnage royalty. These cases were brought in the United States District Court for the Eastern District of Oklahoma and uniformly resulted in judgments in favor of the lessees that these payments could not be exacted. After these decisions in the lower court the United States ceased to attempt to exact the payments. Two of the cases were appealed to the United States Circuit Court of Appeals for the Tenth Circuit. These are *U. S.* v. *M. K. & T. Railroad Company*) 66 Fed. (2) 919), and *U. S.* v. *Eastern Coal & Mining Co.* (66 Fed. (2) 923). In both cases the Tenth Circuit Court of Appeals upheld the decision of the United States Court for the Eastern District of Oklahoma, that the coal companies were not liable for payments under the 1907 regulation.

At this time there were pending negotiations for the new lease to the Panama Coal & Mining Co. which by contract held the rights of the Commerce Trust Co. The Panama Coal & Mining Co. then presented a claim for the right to use the credit standing to the old lease, $13,777.21, upon production to be mined under the new lease, it being thought that these new leases were to be considered extensions of the old.

This claim was presented in 1934. It was finally ruled by the Secretary (in a ruling not communicated to the Panama Coal & Mining Co. or to the Commerce Trust Co. or to their attorneys) that this could not be done. In the meantime, however, other litigation on this question was pending.

In one of the cases brought in the series of litigation started by the United States, there was presented a cross-claim for refund for excessive payments made.

This was the case of *U. S.* v. *Central Coal & Coke Company.* While this case was pending, the Central Coal & Coke Co. undertook reorganization under section 77B of the Bankruptcy Act. Since this company was a resident of the State of Missouri, the proceedings were filed there and all pending litigation was gathered into that proceeding, including the case of *U. S.* v. *Central Coal & Coke Company,* originally filed along with the other coal company cases in the United States District Court for the Eastern District of Oklahoma. That case was tried within the bankruptcy proceeding and resulted in a judgment in favor of Central Coal & Coke Co. for the amount of the overpayments made by virtue of the Secretary's regulation of 1907. This case was not appealed by the United States but a case on the identical question against the surety on the lease bond of the Central Coal & Coke Co. was filed in the United States District Court for the Eastern District of Oklahoma, in which case, the Central Coal & Coke Co. intervened. The court held itself to be bound by the decision of the Missouri court. This holding was affirmed by the Tenth Circuit of Appeals, but was reversed on the question of jurisdiction by the Supreme Court of the United States. At that juncture, it was settled and a compromise judgment was rendered in favor of the Central Coal & Coke Co.

During the time that this litigation was pending, by virtue of the disaster in 1935, the lease was rendered inoperable. The Panama Coal & Mining Co. reassigned to the Commerce Trust Co. all rights which it had acquired under its contract with the Commerce Trust Co., including the right to refund credit on the leasehold.

By tacit consent of all of the parties, the claim of the Panama Coal & Mining Co. filed in 1934 was not acted upon pending the outcome of the litigation. By virtue of the mine disaster in 1935, it, of course, had become evident that the mine could not be operated and, therefore, the question of obtaining repayment through the medium of credit for royalty on coal to be mined had become academic regardless of what the Secretary's ruling might be in that regard. The original claim had been for either credit or direct refund. On March 1, 1940, after the decision of the circuit court of appeals in the Central Coal & Coke Company case, a hearing was conducted in Washington, D. C., before a representative of the Department of the Interior. At that time it was pointed out by such representative that since credit from the old lease could not be transferred to the new, and the new lease not being subject to operation, the advance royalty payments could no longer be claimed by the Commerce Trust Co. and that the amount of the claim should be reduced to the amount of the minimum tonnage royalty credit, $9,395.21, and that, in view of the changed situation, a supplemental application should be filed supported by a brief.

This new application and brief was duly filed in July 1940. The then Choctaw Nation attorney, the Honorable William G. Stigler, was directed to file a reply brief. This he never did. Finally, at the instance of the attorney representing the Commerce Trust Co., the new attorney for the Choctaw Nation, Hon. Ben Dwight, went into the matter, and finally, after considerable correspondence and several conferences, the Choctaw national attorney and Chickasaw national attorney, instead of filing a brief, prepared a letter which was signed by the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation, which letter simply requested the Secretary of the Interior to deny the claim on the ground that this dispute should be decided by the appropriate Federal court. A conference was arranged, and on January 12, 1948, the matter was presented to the Solicitor for the Department of the Interior, in Washington, D. C. At that time the Solicitor, after hearing the matter, agreed that there was no court to which this matter could be presented. However, he further expressed the opinion that it would be inappropriate for the Secretary of the Interior to pass upon the claim since it was his opinion that under the act of _____, 1923,_____ Stat., the Secretary of the Interior was without authority to pay the claim and the matter eventually would have to be presented to the Congress of the United States under any circumstances.

At this conference it developed that the missing account sheet setting out the payments was in the hands of the Commissioner for Indian Affairs. This account sheet disclosed that no charges had been made or paid for the period between the years 1926 and 1932 when the lease finally terminated. It is conceded that advance royalty payments were due for these 6 years, so that from the refund due should be deducted the additional sum of $3,000 which leaves a balance of credit of $6,395.21. This is the amount illegally exacted by the said Government in excess of the amounts due under the terms of the lease for advance royalty and for royalty on coal produced, and it is this amount for which the

Commerce Trust Co. has a just claim which the Congress of the United States should require to be refunded from the funds held by the United States as trustee for the Choctaw and Chickasaw Nations.

There is no court which has authority to entertain a claim against the Choctaw and Chickasaw Nations. The Secretary of the Interior has held that he is unable to pay the claim, and, therefore, there exists no remedy but through the action of the Congress of the United States. Although many years have elapsed, this claim has been assiduously followed, and the delays incident have been the result of inaction on the part of the tribal officials, and not on the part of the claimant, excepting when action was withheld by mutual consent awaiting the outcome of pending litigation.

Yours very truly,

JULIAN B. FITE

MUSKOGEE, OKLA., *August 23, 1950.*

In re H. R. 4459

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR MR. CELLER: There has been furnished to me a copy of the letter of Dale E. Doty, Assistant Secretary of the Interior, dated July 20, 1950, replying to your letter of May 17, with reference to the claim of Commerce Trust Co. wherein you apparently suggested amendment of H. R. 4459 to permit the Commerce Trust Co. to bring suit for the recovery of $6,395.21, the amount in controversy. I note that Mr. Doty recommends that the bill be not enacted in the amended form and calls attention to the fact that in the assignment of the lease in question, the Panama Coal Co. (to whose rights the Commerce Trust Co. is successor) agrees to be bound by the regulations prescribed May 22, 1900, or which might thereafter be prescribed, and agrees to pay any additional rate of royalty that might be required by the Secretary of the Interior, during the remainder of the term of the lease.

In the first place, I wish to call your attention to the fact that the assignee referred to was a mortgagee-purchaser, and was not in a position to protect its rights in the assignment, since the assignment was subject to the approval of the Secretary of the Interior, and if the Secretary of the Interior chose to impose illegal and improper requirements on the assignee, the only other thing, besides acceptance, that it could have done would have been to toss away its security.

This question of assignment has been before the courts at least three times and been decided adversely to the Government on each occasion. Many years ago the United States of America attempted to enforce the provisions of the Secretary's regulations of 1900 and 1907 requiring minimum tonnage payments. In the cases of *United States* v. *McMurray* (181 Fed. 723, decided June 6, 1910), and the case of *Degnan* v. *McConnell Coal & Coke Co.* (decided September 21, 1915; opinion by Campbell, district judge, not officially reported but filed in the records of the United States District Court for the Eastern District of Oklahoma) the court held these regulations to be invalid as contrary to law. The holding of the court was that the Secretary of the Interior was without power to make such regulations, and it would seem to follow that the Secretary of the Interior was without power to require such of the assignee. These two cases do not show in the opinions whether they involved assignments. They were accepted as the law for many years. However, in the year about 1931, the Government again attempted to enforce these regulations in a multitude of cases and was uniformly unsuccessful in the lower court. Two of the cases were chosen to be appealed to the Circuit Court of Appeals for the Tenth Circuit as test cases, and they were again decided adversely. They are as follows: *United States* v. *Missouri-Kansas-Texas Railway Company* (66 Fed. (2d) 919), and *United States* v. *Eastern Coal and Mining Company* (66 Fed. (2d) 923) (both decided September 7, 1933).

Again, in the case of *United States* v. *United States Fidelity and Guaranty Company* (106 Fed. (2d) 804, decided 1939), there was before the circuit court of appeals a case where an affirmative judgment had been rendered in favor of an assignee of a lessee, part of the judgment involving deficit royalty payments made and sought to be recovered back. This case turned largely on jurisdictional grounds and, therefore, you will not find in the reported opinion a statement of these amounts. However, the record so discloses. Subsequently, this case was reversed on jurisdictional grounds by the Supreme Court of the United States and was returned to the United States District Court for the Eastern District of

Oklahoma for trial wherein a judgment was rendered against the Federal Government, which included in part deficit royalties paid, and which were recovered by the lessee and assignee, despite the fact that the lessee's assignee had become the lessee through an assignment approved by the Secretary of the Interior which included the stock requirements that it would be subject to all regulations of the Secretary of the Interior theretofore made or thereafter promulgated. I personally handled this case to conclusion.

I assisted in the preparation of the defense of these cases. In the Eastern Coal & Mining Co. case a lease was assigned by the original lessee subject to the rules promulgated by the Secretary of the Interior. The court held that the United States could not on behalf of the Choctaw and Chickasaw Nations collect deficit tonnage royalty from the lessee's assignee in spite of the assignment and acceptance thereof by the assignee because the Secretary of the Interior had acted in excess of his authority in making the regulations. The Missouri-Kansas-Texas Railway Co. case is yet stronger. There the lease itself embodied in its terms the controversial regulation about minimum tonnage. It was assigned to trustees of the railroad company by an assignment by which they agreed to accept all of the terms of the lease, and all the regulations of the Secretary of the Interior. The court held that the United States on behalf of the Choctaw and Chickasaw Nations was not entitled to collect deficit tonnage royalty because the terms embodied in the lease were in excess of the powers of the Secretary of the Interior, and that the lessee's assignee was not bound by the terms of such regulations even though embodied in the lease itself.

Thus you will see that the contention of the Government, that the claim involved in this matter is precluded by the terms of the assignment, is contrary to at least three court decisions in which this particular contention was one of the matters at issue. The contention of the Secretary of the Interior simply disregards these decided cases. Of course, I realize that in any litigation in this matter I will be confronted with the question of protest as to illegality. That is a matter which I am prepared to present to the court. The decision may be favorable or unfavorable, but it is a litigious question of fact as to which the committee at the hearing I attended expressed a desire that it be litigated before a court, and that a committee was not in a position to hear this evidence. I realize that the committee would be loath to recommend the passage of a bill permitting suit in a matter where the law and the facts were clearly adverse to the prospective party plaintiff. However, such is certainly not the case here.

In summation I make the following statements which I do not believe are subject to being controverted:

First: The amount sought to be recovered from the tribes is definitely money which they were not entitled to collect. The amount is certain, having been taken from the books of the Department of the Interior, and I have conceded every credit that the Department of the Interior has claimed against the payments made.

(They were originally somewhat in excess of $9,000.)

Second: There is no merit to the contention that the Panama Coal Co. (to whose rights the Commerce Trust Co. has succeeded) as an assignee was bound by the illegal regulations of the Secretary of the Interior because of the terms of the assignment—there is the unwritten provision in any such assignment that such regulations must be legal.

Third: There is a controversial matter as to whether the payments made were voluntary payments. I am possessed of proof to the contrary which I offered to submit to the committee, but which the committee thought should be submitted to a court instead.

Under these circumstances, certainly the ends of justice will be best served by allowing my client a forum before which to present its claim. The Department of Interior has taken the position of advocate for the tribes. It is a rather sorry comment on the sense of justice of the gentlemen in that Department that they consistently attempt to block a hearing before an impartial tribunal.

I trust that the committee, to whom I am requesting this letter be submitted, will not be governed by requests which simply disregard the law as decided by the courts.

Respectfully yours,

JULIAN B. FITE.